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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PETER ZUCCARO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STEPHEN R. MAHLER
Attorney for Petitioner
125-10 Queens Boulevard
Kew Gardens, N.Y. 11415
(212) 268-6000

DICK BAILEY PRINTERS, 290 RICHMOND AVE., S.I., N.Y. 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

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PETER ZUCCARO,

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-against-

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTIONS PRESENTED FOR REVIEW

1. Does the Bail Reform Act permit the Government to "appeal" a magistrate's determination fixing bail to a District Judge?

2. May the District Judge then fix bail without regard to the sum set by the magistrate?

3. May an application changing conditions of bail be entertained in the defendant's absence?

LIST OF PARTIES

The parties are as captioned above.

TABLE OF CONTENTS

Page

Questions Presented for Review..... i

List of Parties..... i

Table of Authorities..... ii

Opinions Below..... 1

Statement Concerning Jurisdiction..... 1

Constitutional and Statutory Provisions..... 1

Statement of the Case..... 6

Reasons for Granting the Writ..... 9

By "implying" a Government Right to "appeal" a Magistrate's determination of bail, the Second Circuit has effectively nullified the Bail Reform Act..... 9

Conclusion..... 13

Appendix "A" Hearing of March 5, 1981.....1a

Appendix "B" Notice of Motion.....9a

Order 11a

Appendix "C" Opinion.....12a

Appendix "D" Hearing of March 19, 1981.....17a

Appendix "E" Letter from Supreme Court Dated April 6, 1981 ..... 21a

TABLE OF CASES

Page

Detroit Trust Co. v. The Barlum, 293 U.S. 21, 39, (1934) 9

Fedorenko v. United States, ____U.S.____, 66 L.Ed. 2d 686, 705 (1981) 9

Firestone Tire & Rubber Co. v. Risjurd, ____U.S.____, 66 L.Ed. 2d 571, 581-582 (1980). 10

McCarthy v. Harper, ____U.S.____, 66 L.Ed.2d 782, 783-784 (1981) 11

People v. Cook, 37 N.Y.2d 591, 595, 338 N.E.2d 619 376 N.Y.S.2d 110, 113 (1975) 7

Stack v. Boyle, 342 U.S. 1 (1951) 10

United States v. DiFrancesco, ____U.S.____, 66 L.Ed. 2d 328 (1980) 11

United States v. Hayman, 342 U.S. 205, 223 (1952) 11

TABLE OF AUTHORITIES

Page

Constitution of the United States—Amendment VIII 1

18 U.S.C. §3146, §3147 1,4,9,10,11

Rule 43 Fed. Rules Crim. Proc. 5

N.Y. Criminal Procedure Law §720.20(3) (McKinney's 1971) 7

New York State Penal Law §240.20 7,12

OPINIONS BELOW

No written opinion was issued by the District Court. The opinion of the Court of Appeals has not yet been officially reported and is set forth in the appendix.

STATEMENT CONCERNING JURISDICTION

The judgment of the Court of Appeals was rendered on March 18, 1981, though its opinion was filed on April 6, 1981. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States
Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

18 U.S.C. §3146. Release in noncapital cases prior to trial.

"(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above

methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

"(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

"(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall

inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

"(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed conditions of release is not available, any other judicial officer in the district may review such conditions.

"(e) A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: *Provided,* That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

"(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of

evidence in a court of law.

"(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court.

18 U.S.C. §3147. Appeal from conditions of release.

"(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to section 3146(d) or section 3146(e) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States Court of Appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Said motion shall be determined promptly.

"(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, or (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 3146(a). The appeal shall be determined promptly.

Rule 43 of the Federal Rules of Criminal Procedure: Presence of the Defendant:

"(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

"(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,

(1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or

(2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

"(c) Presence Not Required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

STATEMENT OF THE CASE

On March 4, 1981, petitioner was arrested and charged in a complaint with violating 18 U.S.C. §2113(a) and (d). Arraignment was held before Magistrate A. SIMON CHREIN in the Eastern District of New York on March 4, 1981 at 2:00 P.M. After an extensive hearing, bail was fixed at $150,000.

Dissatisfied with the Magistrate's determination, the Government purported to "appeal" to Judge HENRY BRAMWELL the next day. Petitioner was not produced, nor was his presence "waived." As reflected in the transcript, the Government offered no new grounds for an increase in bail. As stated by the Assistant United States Attorney:

> "With respect to the other statements of Mr. Mahler's, I agree, I make no other representation, your Honor, that these facts were presented to Judge Chrein yesterday. I disagreed with his judgment yesterday under this reasoning and I seek a different judgment from your Honor." (Transcript of court proceedings dated March 5, 1981, pp. 13-14, 8a).

Despite protests by defense counsel and the absence of findings mandated by the Bail Reform Act, 18 U.S.C. §3146 (d), Judge Bramwell merely substituted his discretion for that of the Magistrate and increased bail to $350,000. He apparently accepted, or so the Second Circuit thought the hearsay statements of the Government as "evidence" to support that determination. The statements were, however, erroneous, because petitioner had never

been convicted of a crime,* and the "number of attempted murders" involved an altercation with a police officer in an incident which was subsequently resolved by a plea of disorderly conduct (merely a violation and not a crime under New York State Penal Law §240.20). His other "arrests" either resulted in dismissals or pleas to violations (non-crimes) and petitioner never absconded while on bail. Moreover, additional prejudicial statements made by the Government, without the slightest offer of proof in corroboration of same, which were credited by the courts below, amounted to no more than bald assertations to the effect that defendant had possessed certain weapons; that he frequented a diner "known as a hangout for hoodlums"; that he "has access to a number of automobiles" that are registered to his parents and that he "has access to his share of well over a million dollars in cash." See transcript of court proceedings dated March 5, 1981, pp. 6-8 (4a).

Petitioner appealed Judge Bramwell's order to the United States Court of Appeals for the Second Circuit on March 18, 1981. After hearing argument, a panel consisting of Circuit Judges Lumbard and Newman and District Judge Werker announced that Judge Bramwell's order would be affirmed, with an opinion to be prepared later. The Court's subsequently filed opinion found no difficulty finding a government right of appeal by "implication" and permitted Judge Barmwell to make findings subsequently (13a-16a). It further found that the amendment of the conditions could be made "without any

* More specifically, petitioner had been adjudicated a youthful offender on a prior charge of robbery. Under New York Law, such an adjudication is *not* a criminal conviction. N.Y. Criminal Procedure Law §720.20(3) (McKinney's 1971); *People v. Cook,* 37 N.Y.2d 591, 595, 338 N.E.2d 619, 376 N.Y.S.2d 110, 113 (1975).

prior determination that the magistrate's order was clearly erroneous or contrary to law" (16a), and that the proceedings before Judge Barmwell were properly conducted in petitioner's absence (16a).

Applicant was indicted in the interim and the case assigned to Judge EUGENE H. NICKERSON. Judge Nickerson, however, was out of town at the time (and did not return until March 30, 1981) so the arraignment was held before Judge Bramwell on March 19, 1981.

First, Judge Bramwell refused to reconsider the bail determination, leaving the matter to Judge Nickerson. At the Government's request, however, he made findings, *without a hearing*, merely adopting the Government's "findings" by reference. Defense counsel was not permitted to controvert these "facts." Indeed, the transcript is quite illuminating in that it clearly indicates Judge Bramwell's adamant position in opposition to all of defense counsel's efforts to obtain a fair hearing on the bail issue, he having obviously made up his mind at the very outset of the calendar call to maintain the status quo and adhere to whatever position the Government urged upon him, rather than investigate the matter for himself (1a-8a).

This Court denied petitioner's application for an independent determination of bail on April 6, 1981. Judge Nickerson has set a date of June 8, 1981 and has refused to amend the bail conditions in light of the proceedings in the appellate courts. Accordingly, the issue is not moot.

REASONS FOR GRANTING THE WRIT

BY "IMPLYING" A GOVERNMENT RIGHT TO "APPEAL" A MAGISTRATE'S DETERMINATION OF BAIL, THE SECOND CIRCUIT HAS EFFECTIVELY NULLIFIED THE BAIL REFORM ACT.

The Second Circuit's decision is in serious error. It effectively turns the magistrate's hearing into a mere formality. The Government is permitted, *in the accused's absence,* to "forum-shop" for a favorable District Judge who may amend the condition of bail "without any prior determination that the magistrate's order was clearly erroneous or contrary to law" (8a). This ruling can be expected to have serious consequences in the fixing of bail, an everyday occurrence in the criminal justice system.

Nothing in the Bail Reform Act supports the Second Circuit's opinion. In fact, it said as much because it found authority only "by implication." But, as this Court recently reaffirmed, to "imply a condition which is opposed to the explicit terms of the statute," as did the Second Circuit, is impermissible because it operates "not to construe the Act but to amend it." *Fedorenko v. United States,* __U.S.__, 66 L.Ed. 2d 686, 705 (1981), quoting *Detroit Trust Co. v. The Barlum,* 293 U.S. 21, 39 (1934).

The condition "implied" is certainly "opposed to the explicit terms of the statute." 18 U.S.C. §3147(a) expressly provides that only the "person who is detained . . . may move the court having original jurisdiction over the offense with which he is charged to amend the order" following the initial judicial officer's determination. It is only where the defendant seeks review of the initial determination and the same judicial officer "is not available, (that another) judicial officer in the district may review such conditions." 18 U.S.C. §3146(d).

The Second Circuit's judicial amendment of the statute was accomplished without citation to any case authority or legislative history. It flies in the face of established principles which create a constitutional (*Stack v. Boyle,* 342 U.S. 1 [1951]) and statutory (18 U.S.C. §3146[a]) presumption of bail. As Mr. Justice Jackson (joined by Mr. Justice Frankfurter) observed concurring in *Stack v. Boyle,* 342 U.S. at 7-8, *supra:*

> "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, *the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.* Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death. Fed. Rules Crim. Proc., 46(a)(1) providing: 'A person arrested for an offense not punishable by death shall be admitted to bail . . . ' before conviction.
>
> "*Admission to bail always involves a risk that the accused will take flight. That is a calculated risk which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them.* Fed. Rules Crim. Proc., 46 (f)." (Emphasis supplied)

The Government's argument—that the District Court serves as the appellate court for Magistrate's determinations in general—begs the question that the District Court may be the appellate tribunal for Magistrate rulings is foreign to the issue of whether Congress has, in fact, conferred a right of appeal. Cf. *Firestone Tire & Rubber Co. v. Risjurd,* __U.S.__ 66 L.Ed.2d 571, 581-582 (1980);

United States v. DiFrancesco, __U.S.__, 66 L.Ed.2d 328 (1980); *McCarthy v. Harper,* __U.S.__, 66 L.Ed. 2d 782, 783-84 (1981) (Rehnquist, J., in chambers). In fact, the rules for the trial of petty offenses before magistrates permit an interlocutory appeal only if the "decision or order . . . if made by a judge of the district court . . . could be appealed by the government . . . under any provision of law . . . " (Rule 7(a). Local rules cannot be inconsistent). Rule 8.

In the present case, petitioner was even deprived of his right to findings. If *he* sought review after 24 hours of detention, it was mandated that the "Judicial officer . . . set forth in writing the reasons for continuing the requirement [of bail]." 18 U.S.C. §3146(d); see *Weaver v. United States,* 405 F.2d 353, 354-355 (D.C. Cir.). Judge Bramwell merely stated his difference of opinion: "bail is now set at $350,000," (transcript of March 5, 1981, p. 14, 8a) without stating his reasons.

Moreover, the Second Circuit permitted this "appeal"—actually a "trial de novo"—to be held in the petitioner's absence. Its citation to Fed. R. Crim. P. 43 is circular reasoning because that rule requires an accused's presence at arraignment. It is perverse to suggest that he must be present before a magistrate when bail is initially set and not be a necessary party at amendment. As this Court observed in an analogous context:

> "Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing." *United States v. Hayman,* 342 U.S. 205, 223 (1952).

The "substantial issues of fact" here are manifest. The Government was permitted to put in rank hearsay which could have been easily refuted by petitioner. He was

not "convicted" of robbery previously; under New York law the youthful offender adjudication was *not* a criminal conviction. N.Y. Crim. Proc. Law §720.20(3) (McKinney's 1971); *People v. Cook*, 37 NY.2d 591, 595, 338 N.Y.2d 619, 376 N.Y.S.2d 110, 113 (1975). The "attempted murders" involved an altercation with a traffic police officer and terminated in a plea to disorderly conduct (New York State Penal Law §240.20, a violation which is not a crime). Petitioner is a lifelong resident of New York and has never absconded while on bail.

Judge Bramwell's "findings," after the Second Circuit determinations, hardly complies with the statutory mandate and *Weaver v. United States, supra.* As the transcript shows, these "findings" were actually dictated by the Government (1a-8a). This is obviously not a "review" of the bail conditions.

CONCLUSION

The cavalier attitude toward the Bail Reform Act displayed by the Second Circuit clearly deserves plenary review by this Court.

The petition for a writ of certiorari should be granted and the judgment of the Second Circuit summarily reversed and the matter remitted to the trial judge, Judge Nickerson "for reconsideration in light of the standards which it is [this Court's] function to determine" (*Stack v. Boyle,* 342 U.S. 1, 7, *supra* (Jackson, J., concurring).) Alternatively, the case should be set down for oral argument.

Respectfully submitted,

MAHLER & HARRIS, P.C.
Attorneys for Petitioner

STEPHEN R. MAHLER
Of Counsel

APPENDIX "A"
HEARING OF MARCH 5, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

CR 81-00132

-against-

PETER ZUCCARO,

Defendant.

U.S. Courthouse, Brooklyn, New York

March 5, 1981, 2:00 o'clock p.m.

Before: HON. HENRY BRAMWELL, U.S.D.J.

HENRI LEGENDRE, Court Reporter

Appearances:
EDWARD R. KORMAN, ESQ.
United States Attorney
Eastern District of New York
By: Diane Giacalone, Esq., of Counsel

STEVEN R. MUHLER, ESQ.
Attorney for Defendant

THE CLERK: U.S.A. v. Peter Zuccaro.

MS. GIACALONE: Your Honor, I realize when I was in your courtroom that I had not arranged with Pre-Trial Services to come to the courtroom, and I've called them so they can be here also.

Your Honor, the matter that I would like to bring before you is a matter of bail application for Peter Zuccaro; Peter Zuccaro was arrested yesterday on a complaint and I'll give your Honor a copy of the complaint at this time.

THE COURT: You may proceed.

MS. GIACALONE: The complaint charges Mr. Zuccaro with armored car hijacking on December 26, 1980.

As I indicated yesterday before Judge Chrein who set bail on this matter in the amount of $150,000 cash or surety. There is another armored car hijacking in which it is expected that an indictment will be returned for Mr. Zuccaro on July 29, 1980. The July 29th 1980 armored car hijacking yielded $310,000; this armored car hijacking yielded $370,000.

There were three to four persons involved in both. My bail application on Mr. Zuccaro was for $500,000 cash or surety before Judge Chrein; Judge Chrein set $150,000 cash or surety, and so I make application to this Court for reconsideration of bail.

With respect first, your Honor, to the matter of the complaint in front of you and the cases which are pending, the investigations which are pending which will be indicted surely against Mr. Zuccaro. The complaint on its face indicates a rather strong case, in fact and extremely strong case against Mr. Zuccaro consisting of two eye witness identification.

Additionally, there is other witness testimony and corroborative physical evidence with respect to Mr. Zuccaro's involvement in both hijackings. Mr. Zuccaro faces as a result of these charges an extraordinary prison

sentence potential prison sentence for a man in his position and a man of his age; the Hobbs Act conspiracy and two substantive counts of bank robbery, one of which is armed, being an armed bank robbery count.

With respect to the potential for Mr. Zuccaro being sentenced upon conviction to a rather lengthy sentence, I believe that his prior involvements with the law are significant. Mr. Zuccaro has a series of arrests dating from 1972.

In the first arrest he was convicted after trial of robbery in the second degree, that was in 1972, he was sentenced I believe under a Youthful offender provision.

He has a series of arrests, all of which relate to—most of which relate to stolen property or weapons through 1980—excuse me—1981, those resulted in dismissal, as Mr. Muhler pointed out yesterday.

THE COURT: Do you have a report on Mr. Zuccaro?

MS. BRACKEN: (Pre-trial Services representative): The first I learned about this was in the elevator up on the second floor just now.

MS. GIACALONE: As I indicated, I have forgotten to call Pre-Trial Services and that's why Ms. Bracken didn't know about it until just now.

MS. BRACKEN: I remember some things that I can write down for you right now.

THE COURT: All right.

MS. GIACALONE: Mr. Zuccaro's recent involvement with the armored car arrest, and attempted murder charge—counsel indicated was reduced to a misdemeanor charge recently.

The significant aspect of that arrest is that Mr. Zuccaro was arrested in the company of Frankie Burke, who is Jimmy Burke's son; Jimmy Burke, according to the newspapers is a member of organized crime, who is the mastermind for the Lufthansa robberies, Mr. Zuccaro's association with organized crime is not limited to Mr. Burke.

As I indicated yesterday, Mr. Zuccaro has been seen in the company of Frank Bunomo Senior and Frank Bunomo, Junior by informants and by members of the New York City Police Department, and he has been seen at a cafeteria that they frequent and at their residence.

We have information and testimony with respect to Mr. Zuccaro's possession of numerous small arms, including a sawed off shotgun and an automatic weapon. In the complaint the allegation is that the hijacking was done when armed.

Mr. Zuccaro also frequents a place known as the Lindenwood Diner and has been observed there on many occasions, which is familiar to the New York City Police Department, and it's known as a hangout for hoodlums, including its owner Frank Caniglia (phonetic).

There has been testimony presented before a grand jury with respect to Mr. Zuccaro and his associates; involvement in attempted murders on a variety of individuals, particularly by strangulation and the use of firearms.

Mr. Zuccaro lists for purposes of his arrest his family residence at 945 Belmont Avenue, Brooklyn. However, he was arrested at 7420 58th Avenue and he's known to have resided at two other addresses at 518 163rd Avenue in Queens and 81-03 155th Avenue in Queens.

Mr. Zuccaro has access to a number of automobiles; his parents have registered to them twelve different automobiles and when members of the police department has questioned his parents about certain of those automobiles they have denied any knowledge of them; Mr. Zuccaro has no known regular employment, and to my knowledge has no known employment at all.

In light of these factors, your Honor, in light of the very high likelihood of conviction, the extremely serious nature and the potentially lengthy prison sentence which will follow upon a conviction; Mr. Zuccaro's tenuous

roots in the community and his access to an enormous amount of money; Mr. Zuccaro is one out of four individuals who has access to his share of well over a million dollars in cash.

He also has access to the sons of his cohorts who have not been apprehended at this time. In light of that, I believe that $500,000 cash bail is a reasonable bail in this matter.

MR. MUHLER: It's just about twenty-four hours since we have rehearsed this entire scenario.

THE COURT: So you will repeat it. I'd like to see you.

MR. MUHLER: Thank you very much, I like to see you too.

There isn't anything that was added today that wasn't in front of Judge Chrein in the first place. In the second place, yesterday—it's all right for an assistant U.S. Attorney to go through an entire litany concerning someone's records when they can pretend they don't have an updated sheet as to the disposition, but once in a prior position that that's made known to them, the man has never been convicted of a crime. I think it's unprofessional to appear the next day and to try to pass this off as something other than it is.

THE COURT: Counsel, let me tell you, you do it, I let the Government do it and the defendants do it too, so it's all right with me; it may be unprofessional to you, but this happens to be her responsibility just like I let her do it, I'll let you appear the next day and make any application you want.

MR. MUHLER: Not something not based on facts. As an Officer of the Court it's my duty to tell you something.

THE COURT: You tell me the facts.

MR. MUHLER: All right. The facts are, I believe that the defendant—I've represented him since 1974, I

think. He had a conviction some time back in 1972 when he was a teenager, I don't know what the conviction is, I don't think it's for robbery.

MR. GIACALONE: I'm looking at the sheet. I'll show it to counsel.

MR. MUHLER: He was convicted of being a youthful offender, that's what that kind of plea if in the State Court; instead of pleading to robbery you take a plea bargain and you plead to being a youthful offender, it's no admission that you robbed anybody but it's merely a special treatment.

He's never been convicted of any crime. He was arrested just recently and he was charged true with attempted murder, that charge was such a terrific charge it's now a misdemeanor in Queens County, it was reduced on grand jury direction to a misdemeanor. The allegation was that he was in a car with this fellow Frank Burke and Frank Burke tried to back over a police officer who approached the car at night, out of uniform with guns and that was the allegation, while my client wasn't even in the car.

Unless you are on probation or parole, I don't know of any crime that there is of associating with whomever you so like, while it may not be your choice or my choice, that's not a crime. There is nothing wrong with going to the Lindenwood Diner. To throw all this in the record and to try to make it appear as though you are a bad guy for going to the Lindenwood Diner, wherever that is, I just think it's remiss. This was all done yesterday; to say that he has access to a number of autos, what does that mean, to say that someone has access to a number of autos and to say his parents own several autos. Are they saying that he owns them? I don't understand what that means, that he has access to a million dollars. Did they ever find him with a gun in his possession? Did they arrest him on a gun charge? They say they have such a terrific case. If that be

true, why have they subpoenaed every teenager in the neighborhood to appear, maybe they do have a great case, I don't know. Their complaint certainly doesn't speak to me of so overwhelming a case.

If you look at the complaint in the case the complaint seems to show that the people from this armored company, I think made a photo identification of the defendant, I don't think that's an overwhelming case.

We asked for a hearing date. We want to make a bail application. The defendant has no way of making the present bail of $150,000. There is nothing to indicate that he or his family who live in a house in East New York could possibly come close to making that kind of a bail, or that they possess that kind of money, or they live in a lifestyle that has anything to do with that kind of money.

I represented this defendant, as I said for something like five or six years, so he has a pretty good track record. It's true he was arrested several times. There has never been any trouble with him coming to Court. He's lived his entire life in Brooklyn-Queens border area. I just don't see— he's not a Columbian in a narcotic case who is going to flee out of the country. The man has not been out of the country. I think $150,000 bail is not only excessive under the circumstances, not only isn't there one new fact before you that wasn't in the record yesterday, but the man has no indication of even making that, so I think this is merely a case of overkill.

MS. GIACALONE: If I may, your Honor, with respect to Mr. Muhler's attack upon my recollection of the record, I think I made it quite plain, so there is no mistake, Peter Zuccaro was convicted once, the date that I have is April of 1973; Youthful Offender treatment is simply as in this Court and as Mr. Muhler must know only a matter of sentencing not an offense; the offense is listed on the sheet I offered to show to counsel, robbery first degree, class C felony conviction after trial, according to the updated sheet I have.

Finally, as I indicated, and I believe there were twelve arrests in between, and finally as I indicated there was one charge outstanding now.

With respect to the other statements of Mr. Muhler's, I agree, I make no other representation, your Honor, that these facts were presented to Judge Chrein yesterday. I disagreed with his judgment yesterday under his reasoning and I seek a different judgment from your Honor.

MR. MUHLER: Y.O. in the State Court is not conviction of a crime, it's a conviction of being a Y.O., so the man has never been convicted of any crime.

THE COURT: At this time bail is set at $350,000 cash or surety only.

MS. GIACALONE: Thank you, your Honor.

(Whereupon Court stood in recess in this matter.)

APPENDIX "B"
NOTICE OF MOTION

UNITED STATES COURT OF APPEALS

UNITED STATES OF AMERICA,

Respondent,

-against-

PETER ZUCCARO

Defendant-Appellant.

Notice of Motion for Release from custody pursuant to the Bail Reform Act.

MOTION BY:
STEPHEN R. MAHLER, ESQ.
(212) 268-6000

OPPOSING COUNSEL:
EDWARD R. KORMAN, ESQ.
By: DIANE GIACALONE, ESQ.
(212) 330-7025

Has opposing counsel consented? No.
Has service been effected? Yes.
Is oral argument desired? Yes.
Requested return date: March 17, 1981
Date of argument of appeal, if scheduled: March 17, 1981
Has request for relief been made below? No.
Would expedited appeal eliminate need for this motion?

Yes.
If no, explain why not: Not applicable.
Judge or agency whose order is being appealed: HON. Henry Bramwell & Magistrate A. Simon Chrein

Brief statement of the relief requested: Appellant seeks his release from custody pursuant to 18 U.S.C. §§3146, 3147.

Previous requests for similar relief and disposition: Request made to Magistrate A. Simon Chrein on March 4, 1981, resulting in fixation of bail in sum of $150,000; upon Government's application on March 5, 1981, bail raised by HON. HENRY BRAMWELL to $350,000.

Statement of the issue(s) presented by this motion:

1. Whether Bail Reform Act entitled Government to appeal to District Court Judge for review of bail fixation order made by Magistrate in connection with Magistrate's complaint?

2. Whether Magistrate can fix bail on Magistrate's complaint without making finding of facts as required by 18 U.S.C. §3146.

Brief statement of the facts (with page references to the moving papers): On March 4, 1981, appellant was brought before Magistrate A. SIMON CHREIN in the Eastern District on a Magistrate's Complaint numbered 81-03242 and charging him with violations of 18 U.S.C. §2113(a) & (d). The Magistrate fixed bail at $150,000 without making the appropriate findings of fact as required by 18 U.S.C. §3146. On March 5, 1981, the Government improperly make application to District Court Judge HENRY BRAMWELL, for a review of that bail and Judge Bramwell, acting in excess of his jurisdiction, increased the bail to $350,000 and also did not make the required findings of facts.

Summary of the argument (with page references to the moving papers): 18 U.S.C. §3147 only permits a defen-

dant to seek a review by a District Court Judge of bail set by a Magistrate. Since the Government is not afforded such right by statute, the Order of HON. HENRY BRAMWELL, made and entered on March 5, 1981, raising appellant's bail to $350,000 is a nullity. 18 U.S.C. §3146 required the Magistrate to make findings of fact in support of his fixation of bail. Accordingly, his Order of March 4, 1981, fixing bail at $150,000 is also a nullity.

March 13, 1981
s/Stephen R. Mahler
STEPHEN R. MAHLER
Attorney for Peter Zuccaro

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

A. DANIEL FUSARO, Clerk
Arthur Hller, Deputy Clerk
BEFORE:
HON. J. EDWARD LUMBARD,
HON. JON O. NEWMAN,
Circuit Judges

HON. HENRY F. WERKER
District Judge

March 18, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1287—September Term, 1980

(Argued March 18, 1981 Decided March 18, 1981)
Opinion Filed: April 6, 1981

Docket No. 81-1083

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER ZUCCARO,

Defendant-Appellant.

Before:

LUMBARD and NEWMAN, *Circuit Judges,* and WERKER,* *District Judge.*

Appeal from an order of the United States District Court for the Eastern District of New York (Henry Bramwell, Judge) modifying, on motion of the Government, the conditions of bail previously set by a magistrate.

Affirmed.

* The Honorable Henry F. Werker of the United States District Court for the Southern District of New York, sitting by designation.

STEPHEN R. MAHLER, Kew Gardens, N.Y., N.Y., *for appellant.*

DIANE F. GIACALONE, Asst. U.S. Atty., Brooklyn, N.Y., *for appellee.*

PER CURIAM:

This appeal from an order of the District Court for the Eastern District of New York (Henry Bramwell, Judge) setting bail in the amount of $350,000 primarily concerns the question whether a district judge has jurisdiction to set more stringent terms for bail than those previously set by a magistrate, in the absence of any intervening change of circumstances. On March 4, 1981, appellant Zuccaro was arrested on a complaint charging the hijacking of an armored car in violation of 18 U.S.C. § 2113(a) and (d) (1976). That same day he was presented before United States Magistrate A. Simon Chrein, who set bail at $150,000. The next day an Assistant United States Attorney presented a motion to the District Court, seeking to have bail set at $500,000. After hearing the prosecutor and counsel for the defendant, Judge Bramwell set bail at $350,000. From that order Zuccaro appealed, pursuant to 18 U.S.C. § 3147(b)(2) (1976). We affirmed Judge Bramwell's order after oral argument. This opinion sets forth our reasons.

The bail provisions of the Criminal Code explicitly set forth the authority of a district judge to modify the conditions of bail at the request of the person detained. Section 3146(d) permits a person detained after 24 hours to have the conditions reviewed by the judicial officer who imposed them; that officer is required to set forth

the reasons for the conditions, if their imposition results in confinement. A person detained after reconsideration by the judicial officer pursuant to § 3146(d) is authorized by § 3147(a) to "move the court having original jurisdiction over the offense with which he is charged to amend the order" specifying the conditions of release. *See Grimes v. United States,* 394 F.2d 933 (D.C. Cir. 1967) (requiring prior resort to procedure of § 3146(d); *Shackleford v. United States,* 383 F.2d 212 (D.C. Cir. 1967) (same). However, no explicit authority is spelled out for modifications of conditions of bail at the request of the Government.

Nevertheless, we find such authority implicitly contemplated by the provisions of § 3147(b), which authorizes appellate review of the conditions of bail. Under subsection (b), appellate review is permitted under two circumstances. The first is where a court has denied a motion under subsection (a), *i.e.,* a motion made by the person detained. The second is where conditions of release have been "imposed *or amended* by a judge of the court having original jurisdiction over the offense charged." (Emphasis added). By contemplating amendment of the conditions of release by the trial judge, the statute could mean amendment only upon motion of the defendant or also upon motion of the Government. If the conditions were initially set by the trial judge, as might occur if the judge was the judicial officer before whom the accused was first presented pursuant to Fed. R. Crim. P. 5, there would be no question that amendment could be sought by the Government, since § 3146(e) explicitly authorizes the judicial officer who originally set the conditions of bail to amend his order by imposing additional conditions. We see no reason to doubt that the authority of the trial judge to amend conditions of bail can also be exercised,

upon motion of the Government, when the conditions were previously set by some other judicial officer.

Several considerations lead us to this interpretation. First, conditions of bail are set to govern release "pending trial," 18 U.S.C. § 3146(a). Since the time period for which the conditions are set extends into a period in which the judge with jurisdiction over the offense will be exercising his jurisdiction, he should have authority to make such orders as he deems necessary to assure the presence of the defendant, and the Government should have the opportunity to seek the exercise of that authority. Second, situations frequently arise where a person is arrested in a distant district and then removed to the district of prosecution. Fed. R. Crim. P. 40. When this occurs, it would not make sense to insist that the Government's only recourse in seeking additional conditions of bail is to apply to the judicial officer who originally set the conditions of bail and ask him to amend them under § 3146(e). Third, it must be appreciated that the category of judicial officers authorized to set the initial conditions of bail covers a broad range of officials including local justices of the peace. 18 U.S.C. §§ 3041, 3141. Congress would not likely have accorded these officers authority to set conditions of release immune from revision by a district judge upon the Government's application. We conclude that Judge Bramwell had jurisdiction to entertain the Government's application to alter the conditions of bail.[1] Since we find authority for the District Judge's

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[1] Having set additional conditions of bail, Judge Bramwell will be obliged to set forth his reasons in the event an appropriate challenge is made pursuant to § 3146(d). Normally such application should be made to the district judge prior to seeking review in this Court. We have entertained this appeal despite appellant's failure to seek reconsideration before Judge Bramwell and a statement of reasons, since the essential issue raised is whether the District Judge had jurisdiction.

action in the provisions concerning bail, we need not consider the significance of 28 U.S.C. § 636(b)(1)(A), authorizing a judge to reconsider a pretrial matter determined by a magistrate "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." In our view the trial judge may amend the conditions of bail subject only to the statutory standards applicable to the setting of bail, without any prior determination that the magistrate's order was clearly erroneous or contrary to law.

We also reject appellant's procedural claim that the proceedings before Judge Bramwell required Zuccaro's presence in addition to that of his counsel. The setting of additional conditions of bail is neither a stage of the trial nor any of the other proceedings at which Fed. R. Crim. P. 43 requires the presence of the defendant.

On the merits, we see no basis to disturb Judge Bramwell's order. Zuccaro had previously been convicted of robbery in New York, and has since then been arrested twelve times. The Government presented evidence that he has close ties with organized crime, has no current employment or employment history, is known to possess a sawed-off shotgun, and has been implicated in a number of attempted murders. The hijacking in which Zuccaro is charged involves the theft of $750,000.[2]

Affirmed.

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2 Five days after Judge Bramwell's order, Zuccaro was indicted for the armored car hijacking and also for the previous hijacking of another armored car from which $310,000 was taken.

APPENDIX "D"
HEARING OF MARCH 19, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

PETER ZUCCARO,

Defendant.

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81 CR 132

United States Courthouse, Brooklyn, New York
March 19, 1981

BEFORE: Hon. HENRY BRAMWELL, U.S.D.J.

MICHAEL PICOZZI, Official Court Reporter

Appearances:

EDWARD R. KORMAN, ESQ.
United States Attorney for the
Eastern District of New York

By: IDANE F. GIACALONE, ESQ.
Assistant U.S. Attorney

STEVEN MAHLER, ESQ.
Attorney for Defendant

THE COURT: Counsel, do you waive the reading of the indictment?

MR. MAHLER: Yes.

THE COURT: How does the defendant plead?

MR. MAHLER: Not guilty.

THE COURT: This is Judge Nickerson's case?

MS. GIACALONE: Yes.

THE COURT: Will he be back on the 30th?

MR. MAHLER: This was set by Judge Nickerson's chambers for status conference on April 7th, I believe.

THE COURT: To today?

MR. MAHLER: The note I got from Judge Nickerson's chambers is the matter would be on for your Honor, for arraignment and status conference on April 7th.

THE COURT: Okay, you have a date. Bail continued.

MR. MAHLER: Excuse me, your Honor. I would like to make a bail application.

THE COURT: Go right ahead.

MR. MAHLER: Your Honor, the original bail was set in this case—

THE COURT: I will tell you this, I set bail on this once. It is Judge Nickerson's case. I'm not going to do anything.

MR. MAHLER: I merely request that you make findings of fact in connection with your decision. I request that under Title 18, Section 3146.

MS. GIACALONE: May I be heard?

THE COURT: Yes.

MS. GIACALONE: Mr. Mahler took an appeal of your bail determination to the Court of Appeals and it was denied yesterday. But the Court indicated that Mr. Mahler would have the opportunity to request from your Honor findings of fact and conclusions with respect to bail pursuant to the Bail Reform Act.

I have a copy of the transcript of the earlier hearing

and a copy of the affidavit that I submitted in opposition to Mr. Mahler's application.

My request is that the findings of fact presented by the Government at Pages 4, 5, and 6, and in the conclusions proposed by the Government on Page 6 of that affidavit in opposition to Mr. Mahler's appeal, be adopted by the Court and incorported by reference into the record.

THE COURT: The Court adopts the findings of fact that the Government sets forth in the affidavit of Ms. Giacalone of March 17, 1981, contained on Pages 4, 5, and 6, and the inclusion of law on Page 6 as a basis for the Court's action as to this defendant, as to the bail, and I will leave the issue of bail to Judge Nickerson.

MR. MAHLER: You will?

THE COURT: Yes.

MR. MAHLER: May I respond to the findings of facts for the record?

THE COURT: Yes.

MR. MAHLER: The defendant is 25 years of age. He's never been convicted of a crime. The Government contends that he has lived at numerous residences aside from his parents'. His parents live at 945 Belmont Avenue in Brooklyn. The defendant is a single person and resides in other places apart from his parents' home but never outside of Queens and Brooklyn. He's been a resident of the area for his entire life. I doubt he has a passport. No, he doesn't.

I doubt he's ever been out of the country in his life.

Have you?

THE DEFENDANT: No.

MR. MAHLER: Only on rare occasions has he been out of the Metropolitan area.

The Government claims that his parents have access to numerous automobiles. I don't know what that has to do with the defendant.

They say they have testimony as to his possession of

numerous small arms including a sawed off shot gun and automatic weapon and involved in a number of attempted murders.

I don't understand where they get that.

THE COURT: Among other things, this defendant was convicted in 1973 in New York State as a youthful offender. After that he was arrested twelve times. The majority of these arrests are predicated on possession of stolen property, illegal possession of weapons. All have been dismissed, I grant you that.

Before the Court is an armed—hijack of an armored car in December of 1980. I think there is sufficient basis for what the Court—

MR. MAHLER: Excuse me. Your Honor is reading from a Government's report.

THE COURT: That is what I adopted. I might as well put it on the record. You're smiling, but that is the way it is.

MR. MAHLER: I would like to be heard.

There has been no proof offered at all. I don't think it should be part of the record.

THE COURT: The Court must take into consideration what is before the Court. Something occurred here and the Court must take cognizance of that. And in light of the history of this individual and what is before the Court, the bail is going to remain and you can make your application to Judge Nickerson.

MR. MAHLER: In other words, you would advise I not make any further record?

THE COURT: I suggest you make the application to Judge Nickerson. It's his case. If he wants to let him out, that is up to him. I have nothing to do with that.

MS. GIACALONE: I wil mark this as an Exhibit.

THE COURT: Mark it as an Exhibit.

APPENDIX "E"
LETTER FROM SURPEME COURT
DATED APRIL 6, 1981

Stephen R. Mahler, Esq.
Mahler and Harris
125-10 Queens Boulevard
Kew Gardens, New York 11415

Re: Peter Zuccaro v. United States
A-832

Dear Mr. Mahler:

The Court today entered the following order in the above-entitled case:

"The application for an independent determination of bail pending trial presented to Justice Marshall and by him referred to the Court is denied."

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By: s/Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk